1. ALLIANCE FOR RESPONSIBLE PLANNING v. EL DORADO COUNTY PC-20160346

Petition for Writ of Mandate and Declaratory Relief.

On June 7, 2016 Measure E was approved by the electors. Petitioners Alliance for Responsible Planning filed a petition for writ of mandate and complaint for declaratory and injunctive relief seeking a determination that Measure E is invalid, issuance of a writ of mandate directing the El Dorado County Board of Supervisors (Board) and County of El Dorado to cease enforcing the measure, and the issuance of an injunction prohibiting the Board of Supervisors and County of El Dorado from taking any action to enforce or implement Measure E.

Petitioner argues the following in its opening brief: portions of Measure E are invalid, because they are facially unconstitutional or unconstitutional as applied in that they exact monetary conditions for approvals for projects that exceed the project's fair share of costs to improve roads, highways, intersections, and interchanges to mitigate the traffic impact of the project; portions of Measure E are invalid as they violate the Mitigation Fee Act's reasonable relationship standard and exceed the fair share of costs; Measure E is internally inconsistent and causes the general plan to be internally inconsistent; and Measure E exceeds the authority granted to the electorate in that Measure E's policies and implementation statements obstruct and frustrate implementation of the general plan and meddle with essential government functions of implementing the plan and financing transportation infrastructure, which depends on programs that must comply with strict constitutional and statutory limitations, including the Mitigation Fee Act.

Respondents/Intervenors Taylor and Save Our County oppose the petition on the following grounds: to the extent that the court finds the constitutional challenges to the provisions of Measure E are ripe for review, the provisions are facially constitutional and since there has

been no actual application of Measure E, the provisions can not be challenged as unconstitutional as applied; Measure E is consistent with the general plan; the provisions of Measure E do not mandate projects to pay more than their fair share of the costs of roadway improvements in order to obtain approval of the project, because the provisions leave open how to satisfy the requirement that prior to County approval of the projects all necessary road capacity improvements must be completed to prevent cumulative traffic impacts of the new development projects from reaching LOS F during peak hours upon any highways, arterial roads and other intersections during weekday, peak-hour periods in unincorporated parts of the County; and the implementation statements are consistent with the other statements and consistent with the general plan.

Respondent El Dorado County opposes the petition on the following grounds: the court need not interpret the provisions of Measure E in order to determine whether or not it is facially constitutional; the inquiry is limited to whether or not Measure E is capable of an interpretation that is constitutional or could conceivably be implemented in a constitutional manner; interpretation of Measure E in this litigation is premature until it has been applied to concrete projects and court interpretation at this time infringes on the Board's Right to interpret and implement its general plan; judicial restraint is necessary, because the Board has expertise in interpreting its general plan and its interpretation is entitled to deference; the County Board's duty to enforce Measure E obligates it to implement Measure E in its adjudicatory role by applying the general plan in the context of a specific project, not in response to hypotheticals and speculation; state law precludes an initiative that conflicts with or frustrates a housing element, however, it would be speculative at this time to reach the affordable housing conflict issue; and the implementation statements did not amend the general plan and, therefore, lack legal force.

Respondents/Intervenors Taylor and Save Our County also filed a reply/opposition brief and petitioner filed a reply brief.

Electorate's Power of Initiative – Legislative vs. Administrative Acts

"As we recently stated in *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 777, 35 Cal.Rptr.2d 814, 884 P.2d 645 (*VFRR*): "[W]e will presume, absent a clear showing of the Legislature's intent to the contrary, that legislative decisions of a city council or board of supervisors ... are subject to initiative and referendum." This presumption rests on the fact that the 1911 amendment to the California Constitution conferring the right of initiative and referendum was "[d]rafted in light of the theory that all power of government ultimately resides in the people" and that "the amendment speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them." (*Associated Home Builders, supra,* 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 557 P.2d 473, fn. omitted.) It is " 'the duty of the courts to jealously guard this right of the people [citation].... '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled.' " (*Ibid.*) ¶ FN 5. California Constitution, article II, section 11 provides: "Initiative and referendum powers may be exercised by the electors of each city and county under procedures that the Legislature shall provide. This section does not affect a city having a charter."" (DeVita v. County of Napa (1995) 9 Cal.4th 763, 775–776.)

"In *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 103 Cal.Rptr.2d 269 (*Dunkl*), this court was required to outline the distinction between legislative acts, which the electorate has the power to initiate, and administrative ones, which are not subject to the initiative power: " 'While it has been generally said that the reserved power of initiative and referendum accorded by article IV, section 1, of the Constitution is to be liberally construed to uphold it whenever

reasonable [citations], it is established beyond dispute that the power of referendum may be invoked only with respect to matters which are strictly legislative in character [citations]. Under an unbroken line of authorities, administrative or executive acts are not within the reach of the referendum process [citations]. The plausible rationale for this rule espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality [citations].' [Citation.]" (*Id.* at p. 399, 103 Cal.Rptr.2d 269.) ¶ This court went on in *Dunkl, supra,* 86 Cal.App.4th 384, 103 Cal.Rptr.2d 269 to state the test used to decide whether a particular ballot measure constitutes a legislative or an administrative act, as it is set out and explained in *Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957–958, 114 Cal.Rptr. 678: ¶ " 'The acts, ordinances and resolutions of a municipal governing body may, of course, be legislative in nature or they may be of an administrative or executive character. [Citation.] [¶] Also well settled is the distinction between the exercise of local legislative power, and acts of an administrative nature. [¶] [ ] " ' "*The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.*" ' " [Citation]; [ ] "Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. *Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.*" [Citations.]' (Italics added.)" (*Id.* at pp. 399–400, 103 Cal.Rptr.2d 269 some italics omitted; second italics added.) ¶ In *DeVita, supra,* 9 Cal.4th 763, 38 Cal.Rptr.2d 699, 889 P.2d 1019

the Supreme Court reiterated the distinction that has been developed between a governing body's legislative acts, which are subject to initiative and referendum, and its administrative or executive acts, which are not. (*Id.* at p. 776, 38 Cal.Rptr.2d 699, 889 P.2d 1019.) As previously noted, there is another closely related situation in which a restriction of the local initiative or referendum power will arise: Where the Legislature intended to delegate the exercise of local legislative authority exclusively to the local entity's governing body, thereby precluding initiative and referendum. (*DeVita, supra,* 9 Cal.4th at p. 776, 38 Cal.Rptr.2d 699, 889 P.2d 1019, citing *COST, supra,* 45 Cal.3d at p. 511, 247 Cal.Rptr. 362, 754 P.2d 708.)" (Citizens for Jobs and the Economy v. County of Orange (2002) 94 Cal.App.4th 1311, 1332–1333.)

Measure E amended the general plan's traffic and circulation element by amending existing policies and adding other policies. Most of these policy provisions appear to be legislative in nature and not administrative.

However, policies T-Xa4 and TC-Xa5 may implicate County fiscal management issues.

In concluding that initiative provisions that mandated certain funding levels for public safety agencies exceeded the initiative power of the electorate and are constitutionally invalid, an appellate court stated: "Our conclusion is supported by *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 115 Cal.Rptr.2d 90. In *Citizens* the electorate of Orange County approved an initiative measure providing that the approval of certain land use projects by the board of supervisors would not be valid unless ratified by a two-thirds vote of the electorate. Until ratification, restrictions were imposed on the board's spending of funds for purposes related to the projects. The *Citizens* court determined that the measure was "clearly beyond the power of the electorate" for several reasons, one of which was that "[i]t interferes with the essential government functions of fiscal planning and land use planning...." (*Id.,* at p. 1324, 115 Cal.Rptr.2d 90.) The *Citizens* court noted that in *Rossi v. Brown, supra,* 9

Cal.4th at p. 703, 38 Cal.Rptr.2d 363, 889 P.2d 557, our Supreme Court had "referred to reasoning it had developed in *Geiger v. Board of Supervisors* [*supra,* 48 Cal.2d at pp. 839–840, 313 P.2d 545] ..., to the effect that managing a county government's financial affairs has been entrusted to elected representatives, such as a county board of supervisors, and was an essential function of the board." (*Id.,* at p. 1331, 115 Cal.Rptr.2d 90.) The *Citizens* court concluded that the initiative measure "impermissibly intrudes into Board prerogatives, particularly with respect to the functions of the Board in managing its financial affairs...." (*Ibid;* see also *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 731, 189 Cal.Rptr. 185 ["neither the initiative nor the referendum may be used in a manner which interferes with a local legislative body's responsibility for fiscal management"].)" (Emphasis added.) (Totten v. Board of Supervisors of County of Ventura (2006) 139 Cal.App.4th 826, 840.)

- Policy TC-Xa4

Petitioner contends that policy TC-Xa4 leaves "county tax revenues" undefined and it is invalid in that prohibiting use of County revenue funds to pay for constructing road capacity improvements to offset traffic impacts from new development projects unless first approved by County voters conflicts with state law, because it limits the County's use of state authorized infrastructure financing mechanisms to facilitate road capacity improvements.

Respondents/Intervenors Taylor and Save Our County contend in opposition that the meaning of "county tax revenues" is not so confusing as to prevent implementation,

Policy TC-Xa4 was added by enactment of Measure E and provides: "County Tax Revenues shall not be used in any way to pay for building road capacity improvements to offset traffic impacts from new development projects. Non-county tax sources or revenue, such as federal and state grants, may be used to fund road projects. Exceptions are allowed if voters first give their approval."

The policy appears to impermissibly intrude into Board prerogatives with respect to the functions of the Board in managing its financial affairs and, therefore, the policy is invalid as exceeding the scope of the initiative powers of the electorate. The petition is granted as to policy TC-Xa4.

- Policy TC-Xa5

Petitioner contends that policy TC-Xa5 is invalid in that its requirement of a 2/3 majority vote to create an infrastructure financing district exceeds or is preempted by state law.

Respondents/Intervenors Taylor and Save Our County contend in opposition that the policy merely reiterates state law.

Policy TC-Xa5 was added by enactment of Measure E and provides: "The County shall not create an Infrastructure Financing District unless allowed by a 2/3 majority vote of the people within that district."

The policy expressly provides for a 2/3 vote to form an Infrastructure Financing District. By its own terms, it does not apply to the formation of an Enhanced Infrastructure Financing District.

The procedure for creating infrastructure financing districts expressly mandates approval of the formation of the district by a 2/3 vote.

"(a) At the conclusion of the hearing, the legislative body may adopt a resolution proposing adoption of the infrastructure financing plan, as modified, and formation of the infrastructure financing district in a manner consistent with Section 53395.19, or it may abandon the proceedings. If the legislative body adopts a resolution proposing formation of the district, it shall then submit the proposal to create the district to the qualified electors of the proposed district in the next general election or in a special election to be held, notwithstanding any other requirement, including any requirement that elections be held on specified dates, contained in

the Elections Code, at least 90 days, but not more than 180 days, following the adoption of the resolution of formation. The legislative body shall provide the resolution of formation, a certified map of sufficient scale and clarity to show the boundaries of the district, and a sufficient description to allow the election official to determine the boundaries of the district to the official conducting the election within three business days after the adoption of the resolution of formation. The assessor's parcel numbers for the land within the district shall be included if it is a landowner election or the district does not conform to an existing district's boundaries and if requested by the official conducting the election. If the election is to be held less than 125 days following the adoption of the resolution of formation, the concurrence of the election official conducting the election shall be required. However, any time limit specified by this section or requirement pertaining to the conduct of the election may be waived with the unanimous consent of the qualified electors of the proposed district and the concurrence of the election official conducting the election." (Government Code, § 53395.20(a).)

"After the canvass of returns of any election pursuant to Section 53395.20, the legislative body may, by ordinance, adopt the infrastructure financing plan and create the district with full force and effect of law, if two-thirds of the votes upon the question of creating the district are in favor of creating the district." (Government Code, § 53395.23.)

The Legislature has expressly allowed the electorate to decide whether or not infrastructure financing districts should be formed, therefore, requiring such an election does not impermissibly intrude into Board prerogatives with respect to the functions of the Board in managing its financial affairs related to infrastructure financing districts. The policy does not exceed state law and is consistent with state law related to the formation of such districts. The petition is denied as to policy TC-Xa5.

Respondent County argues that the nine implementation statements found at the conclusion of Measure E fall outside of the electorate's initiative power, because initiatives are limited to specific changes or amendments to the general plan that are legislative in nature and the implementation statements did not amend the general plan.

Respondents/Intervenors Taylor and Save Our County argue in reply that the will of the voters clearly indicates that the implementation statements were added to the portions of the general plan containing implementation measures for the purpose of implementing the amended and added traffic and circulation element policies.

Respondent County cites Marblehead v. City of San Clemente (1991) 226 Cal.App.3d 1504 to support its argument that the implementation statements lack legal authority as not amending the general plan. The appellate court stated the following in that opinion: "Contrary to appellant's argument, Measure E does not directly amend San Clemente's general plan. In effect, it constitutes a resolution by the voters declaring that the city's general plan should be revised to reflect the "*concepts* " expressed in the measure. The actual amendment of the general plan is left to the city council. Which elements of the general plan are affected and how the substantive terms of Measure E are to be incorporated into these elements is unexplained. ¶ The city council could not simply append Measure E to the existing plan. Government Code section 65300.5 declares "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." No element of the general plan may take precedence over the provisions of other elements. (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, 708, 179 Cal.Rptr. 261.) Thus, a review of the entire general plan would be required to determine which elements need to be altered. ¶ While it might be argued the electorate could amend a general plan and direct the city council to revise the city's zoning ordinances to comply with it, Measure E goes beyond

that. It directs the city council to amend both the general plan and the zoning ordinances. This type of measure is not within the electorate's initiative power." (Marblehead v. City of San Clemente (1991) 226 Cal.App.3d 1504, 1510.)

Marblehead, supra is distinguishable. The instant measure amended policies in the general plan's traffic and circulation element and even though not expressly stated, the enactment of Measure E, including the implementation statements, is reasonably construed to also add implementation measures to the general plan that are relevant to the general plan's traffic and circulation element policies. "…the court must, wherever possible, construe an initiative measure to ensure its validity." (Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531, 543.)

In other words, Measure E made specific changes to specific portions of the general plan. The appellate court in Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal.App.4th 565 distinguished Marblehead, supra, and found that specific changes to specific portions of the general plan was a proper exercise of the electorate's initiative power. The appellate court stated: "Pala first argues Proposition C is constitutionally infirm because the initiative's "Implementation" section (Section 7) [Footnote omitted.] proposes only "indirect" amendments to the General Plan and Zoning Ordinance. Pala relies on *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 277 Cal.Rptr. 550 (*Marblehead*). ¶ *Marblehead* invalidated a local initiative measure that directed the San Clemente City Council to enact general plan amendments to reflect specified "*concepts.*" (*Marblehead v. City of San Clemente, supra,* 226 Cal.App.3d at p. 1510, 277 Cal.Rptr. 550.) The San Clemente initiative provided that before any other general plan amendment could be approved, certain defined levels of transportation services and other city services must " 'be achieved and maintained.' " (*Id.* at p. 1507, 277 Cal.Rptr. 550.) The initiative stated " '[u]pon the effective date of this

initiative, the general plan of the City shall be deemed to be amended to contain these concepts and enforced as such by the City.... The City shall within six (6) months revise the text of the general plan and other ordinances to specifically reflect the provisions of this amendment and ordinance.' " (*Ibid.*) ¶ *Marblehead* concluded this initiative was beyond the scope of the electorate's initiative power. Noting that the California Constitution limits the initiative power to the enactment of "statutes" (*Marblehead, supra,* 226 Cal.App.3d at pp. 1508–1509, 277 Cal.Rptr. 550; Cal. Const., art. II, § 8; see *American Federation of Labor–Congress of Indus. Organizations v. Eu* (1984) 36 Cal.3d 687, 707–716, 206 Cal.Rptr. 89, 686 P.2d 609), the *Marblehead* court reasoned the initiative measure was invalid because it did "not directly amend San Clemente's general plan" and therefore it was not a "statute." (*Marblehead, supra,* 226 Cal.App.3d at p. 1510, 277 Cal.Rptr. 550.) The court explained the initiative "constitutes a resolution by the voters declaring that the city's general plan should be revised to reflect the '*concepts* ' expressed in the measure. The actual amendment to the general plan is left to the city council. Which elements of the general plan are affected and how the substantive terms of Measure E are to be incorporated into these elements is unexplained." (*Ibid.) Marblehead* stressed that the city council "could not simply append [the initiative] to the existing [general plan]" since a general plan must be a "consistent" and "integrated" document. (*Ibid.*) ¶ Relying on *Marblehead,* Pala argues each of the subsections of Section 7 "are indirect legislation" and therefore they are "unconstitutional and must be stricken." We disagree. Proposition C's implementation section is not comparable to that found inadequate in *Marblehead.* ¶ Unlike the conceptual directives underlying the *Marblehead* initiative, Section 7A amends the General Plan; it does not rely on future legislative action. This is accomplished by language directing that the land use element of the General Plan be changed to permit a previously impermissible land use (waste disposal) in a particular area (Gregory Canyon).

Section 7A provides the land use element and all relevant community plans and maps "shall be amended to designate the Gregory Canyon site Public/Semi-public lands with a Solid Waste Facility Designator." [Footnote omitted.] This is a proper amendment as it makes a specific change to a specific portion of the General Plan. Because the General Plan's land use element sets forth the county's intentions concerning the distribution, location and use of real property (Gov.Code, § 65302), this was the appropriate element to amend." (Emphasis added.) (Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal.App.4th 565, 575–576.)

The court rejects the County's argument that the implementation statements were invalid and lack legal authority as they did not amend the general plan. The court will address the other issues raised as challenges to the fourth and eight implementation statements later in this ruling.

Constitutionality of Measure E Provisions

Respondents/Intervenors Taylor and Save Our County contend that the facial challenge to the constitutionality of Measure E fails, because there is no total and fatal conflict with applicable constitutional prohibitions in that petitioner has not established that no set of circumstances exists under which the law would be valid. Respondents/Intervenors Taylor and Save Our County further argue: policy numbers TC-Xa3 and TC-Xf can be construed in a manner so as to be constitutional, because discretionary projects with no cumulative traffic impacts would not be conditioned upon first completing road improvements and such projects will not have to be denied due to road traffic conditions not being mitigated by completing road improvements; and the TC-Xf mandate to construct all needed improvements as a condition to approval of a project that causes traffic to exceed an LOS F can be construed in a constitutional manner to mandate construction of the road improvements possibly with funding contributed by the County or a reimbursement agreement in order to meet the fair share

requirement, or the project is denied until the road facility improvements were completed by the County or others. (See Respondents/Intervenors Taylor's and Save Our County's Opposition Brief, page 31, lines 9-12 and page 32, line 21 to page 33, line 2.)

Respondents/Intervenors Taylor and Save Our County further argue that the facial challenge is not yet ripe, because the Board of Supervisors have not yet adopted implementing guidelines for Measure E.

Respondent County contends that it is not necessary for the court to interpret the provisions of Measure E., because the Measure would be constitutional if on its face it is capable of any constitutional application, because some portion of discretionary projects might be able to comply with Measure E by payment of TIM fees or the project will not be required to build infrastructure, because the project impacts will not reach the applicable Loss of Service (LOS) threshold.

Respondent County also argues that interpretation of Measure E is premature, because it would infringe on the Board of Supervisor's right to interpret and implement its general plan.

Respondents/Intervenors Taylor and Save Our County disagree with the County in their reply/opposition brief and argue that the task before the court is not to interpret Measure E and impose the interpretation on the County – the task before the court is to determine whether Measure E is susceptible of an interpretation consistent with applicable constitutional principles.

- Pre-Maturity of Court Review of Measure E

"In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. See *United States v. Raines,* 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference

to hypothetical cases thus imagined"). The State has had no opportunity to implement I–872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions. Cf. *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.,* 226 U.S. 217, 220, 33 S.Ct. 40, 57 L.Ed. 193 (1912) ("How the state court may apply [a statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now"). Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines, supra,* at 22, 80 S.Ct. 519. ¶ Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States,* 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither " 'anticipate a question of constitutional law in advance of the necessity of deciding it' " nor " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander v. TVA,* 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia *451 S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that " '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' " *Ayotte v. Planned Parenthood of Northern New*

Eng., 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion))." (Washington State Grange v. Washington State Republican Party (2008) 552 U.S. 442, 449–451.)

""A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. (*Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 865 [94 Cal.Rptr. 777, 484 P.2d 945].) ' "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute.... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 256 [5 Cal.Rptr.2d 545, 825 P.2d 438], quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180–181 [172 Cal.Rptr. 487, 624 P.2d 1215].)" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145 (*Tobe*).) ¶ Facial challenges to statutes and ordinances are disfavored. Because they often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a barebones record. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151.) Also, facial challenges conflict with the fundamental principle of judicial restraint that courts should not decide questions of constitutional law unless it is necessary to do so, nor should they formulate rules broader than required by the facts before them. (*Ibid.*)" (Emphasis added.) (Building Industry Association of the Bay Area v. City of San Ramon (2016) 4 Cal.App.5th 62, 90.)

The challenges to various policies amended by Measure E do not rest on speculation as to the meaning of the policies as enacted by initiative or require interpretation by the County in the first instance. The petition is not premature.

- Facial Challenge to Constitutionality – Fair Share

The Third District Court of Appeal has held: ""When a statute is attacked as unconstitutional on its face, the attacker 'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute'; instead, the challenger 'must demonstrate that the act's provisions inevitably pose a *present* total and fatal conflict with applicable constitutional prohibitions.' [Citations.] The corollary of this burden is that if this court can conceive of a situation in which [the statute] could be applied without entailing an inevitable collision with and transgression of constitutional provisions, the statute will prevail over [a] challenge." (*People v. Harris* (1985) 165 Cal.App.3d 1246, 1255–1256, 212 Cal.Rptr. 216.) ¶ "In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act." (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594, 131 Cal.Rptr. 361, 551 P.2d 1193 (*Elliott*).) Where possible, "[w]e must construe an enactment to preserve its constitutional validity, and we presume that the enactors understood the constitutional limits on their power and intended the enactment to respect those limits." (*Save Our Sunol, Inc. v. Mission Valley Rock Co.* (2004) 124 Cal.App.4th 276, 284, 21 Cal.Rptr.3d 171.)" (Emphasis added.) (Taxpayers for Improving Public Safety v. Schwarzenegger (2009) 172 Cal.App.4th 749, 769–770.)

"…we start from "the strong presumption that the ordinance is constitutionally valid." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 54, 183 Cal.Rptr.3d 654 (*Allen*), citing *Tobe*,

supra, 9 Cal.4th at p. 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145 and *City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1503, 157 Cal.Rptr.3d 644 (*City of San Diego*).) "We resolve all doubts in favor of the validity of the ordinance. (*City of San Diego*, *supra*, 216 Cal.App.4th at p. 1503 [157 Cal.Rptr.3d 644].) Unless conflict with a provision of the state or federal Constitution is clear and unmistakable we must uphold the ordinance. (*Ibid.*; *Samples v. Brown* [(2007)] 146 Cal.App.4th [787,] 799 [53 Cal.Rptr.3d 216].) Plaintiffs bear the burden of demonstrating that the ordinance is unconstitutional in all or most cases. (*City of San Diego*, *supra*, 216 Cal.App.4th at p. 1054 [1504, 157 Cal.Rptr.3d 644].)" (*Allen*, *supra*, 234 Cal.App.4th at p. 54, 183 Cal.Rptr.3d 654.)" (Emphasis added.) (Building Industry Association of the Bay Area v. City of San Ramon (2016) 4 Cal.App.5th 62, 90.)

With the above-cited principles in mind, the court will determine whether certain general plan policies amended by Measure E are facially constitutional or unconstitutional.

Measure E amended the provisions of traffic policies TC-Xa3 and TC-Xf, among others. Petitioner contends that such amended polices are facially unconstitutional, because they require a property owner to pay more than his or her fair share of road improvements in order to receive County approval of his or her project.

TC-Xa3 previously provided that developer paid traffic impact fees and other available funds shall fully pay all necessary road capacity improvements to fully offset and mitigate all direct and cumulative traffic impacts from new development.

As amended by Measure E it now provides that all necessary road capacity improvements shall be fully completed to prevent cumulative traffic impacts from new developments from reaching LOS F during peak hours upon any highways, arterial roads and other intersections during weekday, peak-hour periods in unincorporated parts of the County before any form of discretionary approval can be given to a project.

TC-Xf previously provided that projects involving tentative map subdivisions of five or more parcels worsening the LOS on the County road system to certain levels shall be conditioned upon the project to construct all road improvements necessary to maintain or attain a certain LOS based on existing traffic, plus traffic generated from the development plus forecasted traffic growth at ten years from the project submittal, or ensure the commencement of construction of the necessary road improvements are included in the County's 10 year CIP.

TC-Xf also previously provided that all other discretionary projects that worsen the LOS on the County road system to certain levels shall be conditioned upon the project to construct all road improvements necessary to maintain or attain a certain LOS standards, or ensure the construction of the necessary road improvements are included in the County's 20 year CIP.

TC-Xf as amended by Measure E provides no alternative to construction of the road improvements. It mandates that where the project involving tentative map subdivisions of five or more parcels that worsen the LOS on the County road system to certain levels, the project is to construct all road improvements necessary to maintain or attain a certain LOS based on existing traffic, plus traffic generated from the development plus forecasted traffic growth at ten years from the project submittal; and all other discretionary projects that worsen the LOS to certain levels are to construct all road improvements necessary to maintain or attain LOS standards detailed in the Transportation and Circulation element of the general plan.

Petitioner contends, among other things, that policies TC-Xa3 and TC-Xf as amended by Measure E violate the takings clause of the 5th Amendment of the U.S. Constitution in that the County general plan now mandates that the proposed project be responsible for construction of all road improvements, including improvements required due to traffic increases arising from other projects.

"Takings challenges outside the above per se compensable categories (those that do not involve a physical invasion or that leave the property owner with some economically beneficial use of the property), may nonetheless go "too far" and be compensable when the regulation substantially interferes with the ability of a property owner to make economically viable use of, derive income from, or satisfy reasonable, investment-backed profit expectations with respect to the property. (*Lingle, supra,* 544 U.S. at pp. 538–539, 125 S.Ct. 2074, citing *Penn Central, supra,* 438 U.S. at p. 124, 98 S.Ct. 2646.) And a condition imposed on a property owner for land use approval will go "too far" when there is no "essential nexus" between the permit condition and a legitimate state interest (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (*Nollan*)), or the condition is not "roughly proportional" to the impact it seeks to address (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (*Dolan*)). [Footnote omitted.]" (Jefferson Street Ventures, LLC v. City of Indio (2015) 236 Cal.App.4th 1175, 1193–1194.)

"*Nollan* and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 547, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Dolan,* 512 U.S., at 385, 114 S.Ct. 2309 (invoking "the well-settled doctrine of 'unconstitutional conditions' "). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. See *id.*, at 384, 114

S.Ct. 2309; *Nollan,* 483 U.S., at 831, 107 S.Ct. 3141. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them. ¶ A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). ¶ *Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. *Dolan, supra,* at 391, 114 S.Ct. 2309; *Nollan,* 483 U.S., at 837, 107 S.Ct. 3141. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out ... extortion" that would thwart the Fifth Amendment right to just compensation. *Ibid.* (internal quotation marks omitted). Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it

may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts. ¶ B ¶ The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, *e.g., Perry,* 408 U.S., at 597, 92 S.Ct. 2694 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital,* 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. ¶ A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval." (Emphasis added.) (Koontz v. St. Johns River Water Management Dist. (2013) 570 US --, 133 S.Ct. 2586, 2594–2595.)

The U.S. Supreme Court held that even monetary exactions must satisfy the nexus and rough proportionality requirements of Nollan and Dolan. (See Koontz v. St. Johns River Water Management Dist. (2013) 570 US --, 133 S.Ct. 2586, 2598–2603.) The U.S. Supreme Court concluded: "We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." (Koontz v. St. Johns River Water Management Dist. (2013) 570 US --, 133 S.Ct. 2586, 2603.) Project approval in that case was

conditioned upon either the property owner dedicating acres of land for wetlands, or paying for off-site mitigation.

Assuming that the California Supreme Court's opinion in San Remo Hotel L.P. v. City and County of San Francisco (2002) 27 Cal.4th 643, 671–672, refusing to extend the Nollan/Dolan analysis to legislatively mandated, formulaic mitigation fees remains valid law despite the U.S. Supreme Court's decision in Koontz, supra, which applies the Nollan/Dolan analysis to monetary exactions relating to development project approvals, the issues raised in this action related to policies TC-Xa3 and TC-Xf are distinguishable from those before the California Supreme Court in San Remo Hotel L.P., supra, in that these amended policies enacted by initiative do not set a formulaic Traffic Impact Mitigation (TIM) fee schedule and instead expressly impose on the proposed project an unlimited amount of liability to pay for road improvement construction as a condition to approval of the project where the project's traffic impact worsens the LOS on roads to a certain level.

In holding that the face of a city ordinance requiring landlords to pay soon to be former tenants the difference between the market rent and the rent controlled rate for a two year period in order to be allowed to remove the property from the rental market, the U.S. District Court, Northern District of California found that the city ordinance was constitutionally invalid on its face, because the monetary exaction did not meet the requirements of the Nollan/Dolan analysis. Citing to the U.S. Supreme court's opinion in Koontz, supra, the U.S. District Court stated: "The critical conceptual link between *Nollan/Dolan* and the challenged Ordinance here comes from the recent Supreme Court decision in *Koontz,* 133 S.Ct. at 2594. The Supreme Court first decided that the nexus requirements of *Nollan/Dolan* apply with equal force where a city *denies* an application to a petitioner who refuses to yield to the City's exaction condition. *Koontz,* 133 S.Ct. at 2591. But more importantly, the Court held that "so-called 'monetary

exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.* at 2599. In *Koontz,* the City offered petitioner two options as a condition of granting a development permit: develop only 1 acre of the site and grant a conservation easement on the rest, or develop all 3.7 requested acres and perform "offsite mitigation," in which petitioner would fund improvements to a distinct parcel of city-owned property. *Id.* at 2598. Unlike an untethered financial obligation, such as the retroactive obligation to pay medical benefits of retired miners at issue in *Eastern Enterprises,* 524 U.S. 498, 118 S.Ct. 2131, the demand for money at issue in *Koontz* " 'operate[d] upon ... an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Id.* at 2599. ¶ In other words, "unlike [in] *Eastern Enterprises,* the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Id.* at 2599. "The fulcrum [*Koontz*] turns on is the direct link between the government's demand and a specific parcel of real property." *Id.* at 2600. "Because of that direct link, [the monetary exaction] implicate[d] the central concern of *Nollan* and *Dolan:* the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Id.* ¶ So too here. The *Nollan/ Dolan* rule governs the land use restriction challenged in the instant case, in which a property owner wishing to make a different use of a property—withdraw it from the rental market for sale or personal use—must apply to the City for a permit to do so. As a condition of granting the necessary Ellis Act permit, the Ordinance requires a monetary exaction—a substantial payment, without which the property owner's proposed new land use is denied and the tenant continues to occupy the unit. As in *Koontz*, where the monetary exaction was subject to a *Nollan/ Dolan* analysis because the City commanded a monetary payment "linked to a specific,

identifiable property interest such as a ... parcel of real property," *id.* here the Ordinance's requirement of a monetary payment is directly linked to a property owner's desire to change the use of a specific, identifiable unit of property. "Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan"* as acutely and in the same way as the traditional land-use permitting context: the risk that San Francisco has used its substantial power under the Ellis Act to pursue policy goals that lack an essential nexus and rough proportionality to the effects of a property owner withdrawing a unit from the rental market. *See id.* ¶ Additional parallels persuade this Court that the *Nollan/ Dolan* framework applies to the Ordinance challenged here. They are the same parallels that encouraged the Ninth Circuit to apply the *Nollan/Dolan* rule to a Marketing Order that required a certain percentage of the raisin crop be diverted from the market. *Horne,* 750 F.3d at 1142–43. As in *Nollan, Dolan,* and *Horne,* the challenged Ordinance requires a conditional exaction: the loss of substantial funds or physical control over the landlord's unit. *See Horne,* 750 F.3d at 1143. All conditionally grant a government benefit in exchange for the exaction, which here takes the form of the Ellis Act permit that the landlord must have in order to withdraw property from the rental market. *See id.* at 1143. "And, critically, all" of these cases "involve choice": the Nollans could have continued to lease their property with the existing structure, Ms. Dolan could have left her store and parking lot unchanged, the Hornes could have avoided the Marketing Order by planting different crops, and the Levins and Park Lane can avoid paying the exaction by subjecting their property to continued occupation by an unwanted tenant. *See id.* [Footnote omitted.] ¶ **[*1084]** In line with *Nollan, Dolan,* and *Koontz,* Plaintiffs' complaint "does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money." *See Koontz,* 133 S.Ct. at 2600. Rather, Plaintiffs' claim relies, as it should, "on the more limited proposition that when the government commands the relinquishment of funds linked to a

specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent." *See id.*" ¶ "The Court turns, then, to evaluating under the *Nollan/ Dolan* framework whether the payouts required by the Ordinance have an essential nexus with, and are roughly proportional to, the harm caused by a property owner's withdrawal of a unit from the rental market. *See Koontz,* 133 S.Ct. at 2600. The Ordinance on its face fails both the essential nexus and rough proportionality tests. It requires that property owners seeking a permit to cease renting their property pay the evicted tenant an amount equal to two years' worth of the alleged gap between the reduced rent the tenant was paying the property owner and the market rent for a comparable unit. In other words, according to the City, because the eviction is the but-for cause of the tenant being exposed to perhaps unaffordably high market rents, the property owner must pay for two years of that rent differential. ¶ But the property owner's decision to repossess a unit did not cause the rent differential gap to which the tenant is now exposed. Two variables, neither of which is attributable to the property owner, give rise to the rent gap differential. One variable is the market rate. The limited supply—and correspondingly high price—of rental units in San Francisco is, on the City's own evidence, caused by entrenched market forces and structural decisions made by the City long ago in the management of its housing stock. (Levin v. City and County of San Francisco (N.D. Cal. 2014) 71 F.Supp.3d 1072, 1082–1084.)

The court finds the opinion in Levin, supra, persuasive. The case before the court appears to be analogous to the Levin case.

Amended Policy TC-Xa3 on its face mandates that no discretionary approvals be granted to projects until all necessary road capacity improvements are fully completed to prevent cumulative traffic impacts from new developments from reaching LOS F during peak hours

upon any highways, arterial roads and other intersections during weekday, peak-hour periods in unincorporated parts of the County. Amended Policy TC-Xf mandates that subdivision projects of five or more parcels that increase the roadway LOS to a certain level can not be approved unless conditioned on the project constructing road improvements necessary to maintain or attain certain LOS levels of the County road system taking into account existing traffic, traffic generated by the project, and forecasted traffic growth at 10 years from project submittal; and mandates approval of all other discretionary projects be conditioned on the project constructing the road improvements necessary to maintain or attain certain LOS levels. (Emphasis added.)

In other words, in order to obtain project approval the property owner/developer seeking approval of a single project is expressly solely responsible to pay for construction of all road improvements necessary to bring the traffic volume on the roads affected by the project to a specified LOS level. This would require property owners/developers to pay for not only the project's incremental impact to traffic congestion of the County road system, but also be responsible to pay for improvements that arise from the cumulative effect of other projects, and in some instances to pay for projected future increases in traffic. This clearly exceeds the developer's fair share in that it is not roughly proportional to the project's traffic impact it seeks to address.

Respondents/Intervenors Taylor and Save Our County contend that policy numbers TC-Xa3 and TC-Xf can be construed in a manner so as to be constitutional as providing that discretionary projects with no cumulative traffic impacts would not be denied or required to first construct road improvements, because necessary road capacity improvements would not have to be completed; and that the TC-Xf mandate to construct all needed improvements as a condition to approval of a project that causes traffic to exceed an LOS F can be constitutionally

construed to mandate construction of the road improvements possibly with funding contributions from the County or a reimbursement agreement in order to meet the fair share requirement, or the project is denied until the road facility improvements were completed by the County or others.

That fact that policy numbers TC-Xa3 and TC-Xf are inapplicable in instances where the LOS levels do not attain or exceed a certain limit does not establish they are facially constitutional. While the policy will prevail over a facial constitutional challenge where the court can conceive of a situation where the policy could be applied without entailing an inevitable collision with and transgression of constitutional provisions (Emphasis added.) (Taxpayers for Improving Public Safety v. Schwarzenegger (2009) 172 Cal.App.4th 749, 769.), conceivable situations where the policy does not apply can not form the basis for finding the policy is facially constitutional. (Emphasis added.) In other words, factual situations where the policy does not apply can not form the basis for finding that the statute/policy can be construed to apply in a constitutional manner. Policy TC-Xa3 simply can not be applied to situations where there is a discretionary approval of a project and the cumulative traffic impacts do not reach LOS F during peak hours upon any highways, arterial roads and intersections during the week day, peak hour periods. Therefore, that factual situation is irrelevant to the determination of the constitutionality of policy numbers TC-Xa3 and TC-Xf.

In addition, denial of the project permit until someone else constructs the mandated road improvements is not a valid infringement on the property rights of the project developer/property owner in that all it does is attempt to coerce the property owner to construct the road improvements himself or be forced to wait an indefinite period of time until someone else is coerced to take on the job to construct the improvements. The U.S. Supreme Court has stated: "We have often concluded that denials of governmental benefits were impermissible

under the unconstitutional conditions doctrine. See, *e.g., Perry,* 408 U.S., at 597, 92 S.Ct. 2694 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital,* 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. ¶ A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval." (Emphasis added.) (Koontz v. St. Johns River Water Management Dist. (2013) 570 US --, 133 S.Ct. 2586, 2595.)

The mandated road improvement construction condition is placed squarely and solely on the shoulders of the developer/property owner who wishes his or her discretionary project or subdivision project to be permitted to go forward. It does not mandate in any manner that the costs of road improvement construction is reimbursable from the County TIM funds to the extent that the costs of the improvements exceed the developer's/property owner's fair share/reasonably proportionate costs to mitigate the traffic increase on the County road system attributable to the project. In fact, Measure E amended policy TC-Xg by striking the portion of that policy allowing the County to reimburse a project from impact fees for road improvements constructed by the project that cost more than the project's fair share. The County government has placed the ultimate responsibility for payment of the costs of all necessary road improvements solely upon a single project's developer/property owner in order for the developer/property owner to be permitted to proceed with the project.

Policies TC-Xa3 and TC-Xf are unconstitutional in that they violate the takings clause by mandating a property owner to pay more than his or her fair, proportional share of the costs of mitigation of traffic caused by development as a condition to approval of permits to develop the property.

The petition is granted as to policies TC-Xa3 and TC-Xf

Petitioner also argues that policy TC-Xa6 violates the fair share requirement for TIM fees collected, because it allows for use of such fees to pay for maintenance of existing roads and the fees are not limited to improvements required by the traffic increases caused by the projects permitted.

Respondents/Intervenors Taylor and Save Our County argue in opposition that the County staff's analysis has found that this policy is consistent with existing General Plan Policy 10.2.2.3 that fees collected shall be applied to the geographic zone from which they originated and such a finding establishes that the policy complies with the Mitigation Fee Act and nexus/fair share analysis.

Policy TC-Xa6 provides: Mitigation fees and assessments collected for infrastructure shall be applied to the geographic zone from which they were originated and may be applied to existing roads for maintenance and improvement projects.

"(a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Government Code, § 66000(a)

"(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following: ¶ (1) Identify the purpose of the fee. ¶ (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not,

be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged. ¶ (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed. ¶ (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed." (Government Code, § 66001(a).)

"If a local agency requires the payment of a fee specified in subdivision (c) in connection with the approval of a development project, the local agency receiving the fee shall deposit it with the other fees for the improvement in a separate capital facilities account or fund in a manner to avoid any commingling of the fees with other revenues and funds of the local agency, except for temporary investments, and expend those fees solely for the purpose for which the fee was collected. Any interest income earned by moneys in the capital facilities account or fund shall also be deposited in that account or fund and shall be expended only for the purpose for which the fee was originally collected." (Government Code, § 66006(a).)

"(c) For purposes of this section, "fee" means any fee imposed to provide for an improvement to be constructed to serve a development project, or which is a fee for public improvements within the meaning of subdivision (b) of Section 66000, and that is imposed by the local agency as a condition of approving the development project." (Government Code, § 66006(c).)

"At the time the local agency imposes a fee for public improvements on a specific development project, it shall identify the public improvement that the fee will be used to finance." (Government Code, § 66006(f).)

"A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." (Government Code, § 66001(g).)

"A local agency shall expend a fee for public improvements, as accounted for pursuant to Section 66006, solely and exclusively for the purpose or purposes, as identified in subdivision (f) of Section 66006, for which the fee was collected. The fee shall not be levied, collected, or imposed for general revenue purposes." (Emphasis added.) (Government Code, § 66008.)

The court takes judicial notice of Resolution Number 191-2016 of the Board of Supervisors of the County of El Dorado, dated December 6, 2016, which is the most recent County Resolution related to the Traffic Impact Mitigation (TIM) Fee Program. That resolution makes the following findings as mandated by Section 66001(a): the purpose of the TIM fee is to fund capital transportation/circulation improvements directly related to the incremental traffic burden on the County transportation system arising from new development in the unincorporated west slope area through 2035; transportation improvements funded by the TIM fees include future improvements as well as improvements already installed which are subject to reimbursement agreements; the TIM fee is to be used to fund transportation improvements necessary to accommodate new development; the TIM fee will fund new local roads, local road upgrades and widenings, signalization and intersection improvements, operational and safety improvements, Highway 50 improvements, bridge replacement and rehabilitation, providing funding for transit improvements, and costs associated with ongoing staff and consultant costs for annual updates, major updates, and ongoing administration related to the TIM fee program.

In reference to a meaningful ends-means review of TIM fees set by a legislative body, the California Supreme Court has stated: "As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov.Code, § 66001; *Ehrlich, supra,* 12 Cal.4th at pp. 865, 867, 50 Cal.Rptr.2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.); *id.* at p. 897, 50 Cal.Rptr.2d 242, 911 P.2d 429 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640, 94 Cal.Rptr. 630, 484 P.2d 606.)" (San Remo Hotel L.P. v. City And County of San Francisco (2002) 27 Cal.4th 643, 671.)

Policy TC-Xa6 is not limited to the new road improvements and road upgrades use identified in the TIM Fee program. It also provides for use of the TIM fees for routine costs of maintenance of existing roads. Therefore, policy TC-Xa6 violates Government Code, § 66008. In addition, it violates the means-ends test in that the policy purports to expand the fee to cover road maintenance without any of the required statutory findings that there is a reasonable relationship between the road maintenance and type of development project the fee is applied to and a reasonable relationship between the need for maintenance of existing roads and the type of development project on which the fee is imposed.

The petition is granted as to policy TC-Xa6.

- Amended Policy TC-Xg

Petitioner contends that amended policy TC-Xg, which struck the provisions allowing for funding the project's fair share of required road improvements through payment of a TIM fee and allowed reimbursement with TIM fee funds where a project constructed road improvements that exceeded the project's fair share, is invalid, because historically where a project has constructed road improvements that benefit other developments, the project was

entitled to reimbursement of costs incurred in excess of the project's fair share and it seeks to deny use of TIM fees for mitigation.

Amended policy TC-Xg provides: "Each development project shall dedicate right-of-way, design and construct or fund any improvements necessary to mitigate the effects of traffic from the project. The County shall require an analysis of impacts from traffic from the development project, including impacts from truck traffic, and require dedication of needed right-of-way and construction of road facilities as a condition of development." (Emphasis added.)

The above cited language is the same as the original policy TC-Xg, except that it omits the original policy's language related to the County having the discretion to allow a project to fund its fair share of improvement costs through payment of TIM fees and to allow the developer to receive reimbursement from impact fees for construction of improvements beyond the projects fair share.

Amended policy TC-Xg merely requires that the project dedicate a right-of-way and/or pay for improvements necessary to mitigate the traffic impact of the project. It does not state on its face that the project was obligated to pay in excess of its fair share of the traffic impact costs or dedicate a right of way that exceeds its fair share to mitigate the traffic impacts caused by the project.

In addition, TIM fees remain part of the Traffic and Circulation Element of the General Plan. (See General Plan, page 61, Policy TC-Xa6 on page 70, policy TC-Xh on page 73, and Implementation Measure TC-B.) The language of amended policy TC-Xg expressly allows the developer the option of funding any improvements necessary to mitigate the effects of traffic from the project. It does not mandate that the only option is for the project to design and construct the improvements and does not limit the project to any particular means of funding any improvements necessary to mitigate the effects of traffic from the project. Therefore, on its

face, payment of TIM fees are still available to fund any improvements necessary to mitigate the effects of traffic from the project.

The policy is not facially invalid. Inasmuch as there is no specific application of the policy to a project before the court, the amended policy can not be found to be invalid as applied. The court rejects petitioner's claim that policy TC-Xg is invalid. The petition is denied as to policy TC-Xg.

Consistency with General Plan

"We emphasize that an initiative amendment must conform to all the formal requirements imposed on general plan amendments enacted by the legislative body. The amendment itself may not be internally inconsistent, or cause the general plan as a whole to become internally inconsistent (Gov.Code, § 65300.5), or to become insufficiently comprehensive (*id.,* § 65300), or to lack any of the statutory specifications for the mandatory elements of the general plan set forth in Government Code section 65302. (See *Garat v. City of Riverside, supra,* 2 Cal.App.4th at pp. 293–294, 3 Cal.Rptr.2d 504.) If a general plan amendment is substantively deficient, then it may be challenged on that basis, and courts have sufficient remedies to correct the problem. (See *Concerned Citizens of Calaveras County v. Board of Supervisors, supra,* 166 Cal.App.3d 90, 103–104, 212 Cal.Rptr. 273.) When matters of substance rather than procedure are concerned, courts will not employ a double standard for initiative amendments and general plan amendments enacted by the legislative body." (DeVita v. County of Napa (1995) 9 Cal.4th 763, 796, fn 12.)

"In construing the provisions of this article, the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (Government Code, § 65300.5.)

""[T]he general plan [is] a ' "constitution" for future development' [citation] located at the top of 'the hierarchy of local government law regulating land use' [citation]. [¶] The general plan consists of a 'statement of development policies ... setting forth objectives, principles, standards, and plan proposals.' [Citation.] The plan must include seven elements—land use, circulation, conservation, housing, noise, safety and open space—and address each of these elements in whatever level of detail local conditions require [citation]. General plans are also required to be 'comprehensive [and] long[ ]term' [citation] as well as 'internally consistent.' [Citation.] The planning law thus compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772–773, 38 Cal.Rptr.2d 699, 889 P.2d 1019, fn. omitted.)" (Foothill Communities Coalition v. County of Orange (2014) 222 Cal.App.4th 1302, 1310.)

"A general plan is internally inconsistent when one required element impedes or frustrates another element or when one part of an element contradicts another part of the same element. For example, a land-use element calling for substantial increases in population is inconsistent with a circulation element acknowledging that existing roads are inadequate to handle more traffic and offering no practical way to obtain better roads. (See *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 103, 212 Cal.Rptr. 273.) Likewise a circulation element suggesting in one section that the existing road system is adequate for the long term but admitting in another section that the roads cannot handle projected increased future traffic is internally inconsistent. (*Id.* at p. 98, 212 Cal.Rptr. 273.)" (South Orange County Wastewater Authority v. City of Dana Point (2011) 196 Cal.App.4th 1604, 1619.)

With the above-cited principles in mind, the court will address the arguments of inconsistency of the general plan elements after amendment of the Traffic and Circulation Element policies by Measure E.

- Amended Policy TC-Xa1

Petitioner contends that amended policy TC-Xa1 is invalid in that it violates state law relating to affordable housing and is in conflict with the general plan's goals and objectives regarding affordable and moderate housing projects, because the amendment eliminated policy TC-Xa1's limitation to single family subdivision development projects, increased the scope of its applicability to all residential developments of five units or parcels of land, and eliminated TIM fees as mitigation for cumulative effects.

Respondents/Intervenors Taylor and Save Our County contend in opposition that the County staff discussed in page 5 of a December 12, 2016 memo to the Board the effects of Measure E on the general plan's Housing Element and the County's Regional Housing Needs Allocation; and staff stated in the memo that there existed multiple ways in which the County could increase housing sites while implementing Measure E. (See Intervenors' Attachment (IA) 7.)

Amended policy TC-Xa1 provides: "Traffic from residential development projects of five or more units or parcels of land shall not result in, or worsen, Level of Service F (gridlock, stop-and-go) traffic congestion during weekday, peak-hour periods on any highway, road, interchange or intersection in the unincorporated areas of the county."

"A program which sets forth a schedule of actions during the planning period, each with a timeline for implementation, which may recognize that certain programs are ongoing, such that there will be beneficial impacts of the programs within the planning period, that the local government is undertaking or intends to undertake to implement the policies and achieve the

goals and objectives of the housing element through the administration of land use and development controls, the provision of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available, and the utilization of moneys in a low- and moderate-income housing fund of an agency if the locality has established a redevelopment project area pursuant to the Community Redevelopment Law (Division 24 (commencing with Section 33000) of the Health and Safety Code). In order to make adequate provision for the housing needs of all economic segments of the community, the program shall do all of the following: ¶ * * * (3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. The program shall remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities. (Government Code, § 65583(c)(3).)

"Each city, county, or city and county shall ensure that its housing element inventory described in paragraph (3) of subdivision (a) of Section 65583 or its housing element program to make sites available pursuant to paragraph (1) of subdivision (c) of Section 65583 can accommodate its share of the regional housing need pursuant to Section 65584, throughout the planning period." (Government Code, § 65863(a).)

"(a)(1) For the fourth and subsequent revisions of the housing element pursuant to Section 65588, the department shall determine the existing and projected need for housing for each region pursuant to this article. For purposes of subdivision (a) of Section 65583, the share of a city or county of the regional housing need shall include that share of the housing need of persons at all income levels within the area significantly affected by the general plan of the city or county. ¶ (2) While it is the intent of the Legislature that cities, counties, and cities and

counties should undertake all necessary actions to encourage, promote, and facilitate the development of housing to accommodate the entire regional housing need, it is recognized, however, that future housing production may not equal the regional housing need established for planning purposes." (Government Code, § 65584(a).)

"The regional housing needs allocation plan shall be consistent with all of the following objectives: ¶ (1) Increasing the housing supply and the mix of housing types, tenure, and affordability in all cities and counties within the region in an equitable manner, which shall result in each jurisdiction receiving an allocation of units for low- and very low income households. ¶ (2) Promoting infill development and socioeconomic equity, the protection of environmental and agricultural resources, and the encouragement of efficient development patterns. ¶ (3) Promoting an improved intraregional relationship between jobs and housing. ¶ (4) Allocating a lower proportion of housing need to an income category when a jurisdiction already has a disproportionately high share of households in that income category, as compared to the countywide distribution of households in that category from the most recent decennial United States census." (Government Code, § 65584(d).)

The statutes do not appear to mandate any particular manner to plan to provide for affordable housing to meet the County's regional housing needs allocation. County staff in the December 12, 2016 memo was apparently concerned that the California Department of Housing and Community Development (HCD), which certified the housing element of the general plan in 2013, would raise issues concerning the amendment that now requires multiple unit/dwelling projects to be scrutinized regarding the project worsening or resulting in an LOS F during weekday, peak-hour periods on any highway, road, interchange or intersection in the unincorporated areas of the county.

The court takes judicial notice that TIM fees remain part of the Traffic and Circulation Element of the General Plan (See General Plan, page 61, Policy TC-Xa6 on page 70, policy TC-Xh on page 73, and Implementation Measure TC-B.) and that the TIM fee offset program appears to be still in effect as an incentive for developing affordable housing in the unincorporated part of the County. (See Board Policy B-14.) The 2013-2021 Housing Element of the General Plan discusses that TIM offset program as follows: "Cost factors of up to $35,740 per unit could constrain development, especially multi-family housing, second units, and special needs housing. In order to lessen the cost burden on affordable housing, the County has adopted a TIM fee waiver process for the development of affordable housing. The waiver is not an exemption from TIM fees, but is a fee offset program funded at approximately $1,000,000 per year. Offsets of 25 percent to 100 percent per affordable unit are available depending on the level and length of affordability and other policy requirements. The Board of Supervisors has approved additional TIM fee offset amounts specified in this policy when the project by design has met additional goals and objectives in the General Plan (i.e. infill, density, energy efficient, transit oriented and pedestrian friendly)." (General Plan 2013-2012 Housing Element, page 4-54.) The Housing Element also address the HCD's concern related to Traffic and Circulation issues impacting affordable housing in the following manner: "One of the primary concerns of the State Department of Housing and Community Development (HCD) of the previous Housing Element was the impact of Measure Y on multi-family sites. The concern was the effects of cost of off-site improvements and feasibility of development in the planning period. HCD recommended the county mitigate the impacts of Measure Y in respect to the availability of sites to accommodate higher density, multi-family housing for lower income households. ¶ To help address these concerns, the County has implemented fee waiver programs to assist affordable housing projects, including Board Policy B-14 - TIM Fee Offset

for Developments with Affordable Housing Units, and is proposing numerous policies to lessen the impact of the TC-X Policies including an amendment of the Zoning Ordinance to allow mixed-use development by right within Commercial zoning districts (Measure HO-2013-31) and prepare a study on the benefits of mixed-use development on traffic impacts (Measure HO-2013-35). It is anticipated that based on the findings from the mixed-use analysis, the TIM fees applied to multi-family development can be reduced when constructed as part of a mixed-use development. This policy greatly increases the number of sites where multi-family housing is allowed by right." (General Plan 2013-2012 Housing Element, pages 4-56 to 4-57.)

It does not appear that the amendment to include multi-unit projects in policy TC-Xa1 violates state law regarding affordable housing.

As for the claimed inconsistency with the housing element of the general plan, petitioner cites no specific affordable housing policy of the housing element that is impeded or frustrated by TC-Xa1. As stated above, there are other measures in place to mitigate costs associated with construction of traffic improvements to address the LOS F issue arising from proposed affordable housing projects. There does not appear to be an inconsistency between the amended Traffic and Circulation Element policy and the affordable housing portion of the Housing Element of the General Plan.

The petition is denied as to policy TC-Xa1.

- Amended Policy TC-Xa2

Petitioner contends that amended policy TC-Xa2 is invalid as inconsistent with the adopted and certified housing element of the general plan, because it eliminated the Board's discretion to add to the list of roads allowed to operate at LOS F by a supermajority vote of 4 out of 5 supervisors.

Respondents/Intervenors Taylor and Save Our County contend in opposition that it is sheer speculation to argue that the Board's inability to add LOS F highways and roads to the list of roads allowed to operate that that level will result in problems with the HCD certification of the housing element and there is no evidence cited in the record to support such a claim.

Amended policy TC-Xa2 provides: "The County shall not add any additional segments of U.S. Highway 50, or any other highways or roads, to the County's list of roads from the original Table TC-2 of the 2004 General Plan that are allowed to operate at Level of Service F without first getting the voter's approval."

The Measure E amendment of this policy struck out the alternative to approve adding roads to the list by a supermajority 4/5 vote of the Board of Supervisors and added the specification that the list shall be the original Table TC-2 of the 2004 General Plan.

Petitioner cites no specific affordable housing policy of the housing element that is impeded or frustrated by the fact that policy TC-Xa2 does not allow the Board by a 4/5 vote to add roads to the subject list. There does not appear to be an inconsistency between the amended Traffic and Circulation Element policy and the affordable housing portion of the Housing Element of the General Plan.

The petition is denied as to policy TC-Xa2.

- Policy TC-Xa7

Petitioner contends that policy TC-Xa7 conflicts with the goals and objectives of the general plan related to affordable housing for lower or moderate income households by requiring the denial of project applications where the project fails to comply with all policies numbers TC-Xa1 through TC-Xa6.

Respondents/Intervenors Taylor and Save Our County contend in opposition that the County staff identified options to implement Measure E in a way that will not conflict with the

affordable housing goals and policies even after enactment of Measure E and, therefore, policy TC-Xa7 can not be said to be inconsistent with the other portions of the general plan related to affordable housing.

Policy TC-Xa7 was added by enactment of Measure E and provides: "Before giving approval of any kind to a residential development project of five or more units or parcels of land, the County shall make a finding that the project complies with the policies above. If this finding can not be made, then the County shall not approve the project in order to protect the public's health and safety as provided by state law to assure that safe and adequate roads and highways are in place as such development occurs."

Petitioner cites no specific affordable housing policy of the housing element that is impeded or frustrated by the fact that policy TC-Xa7 requires findings that the proposed affordable housing project complies with policy numbers TC-Xa1 through TC-Xa6.

The court has already determined that policy TC-Xa3 is unconstitutional and policy TC-Xa6 is invalid as it violates Government Code, § 66008. Therefore, these policies can not form the basis for a claim of inconsistency with the general plan element related to affordable housing for lower or moderate income households. Petitioner's challenges to policy numbers TC-Xa4 and TC-Xa5 did not involve an argument that they were inconsistent with the general plan element related to affordable housing for lower or moderate income households, therefore, requiring findings of consistency with such policies can not form the basis for a claim of inconsistency. That leaves the requirement that in order to approve an affordable housing project the county must find that the project complies with policy numbers TC-Xa1 and TC-Xa2. As stated earlier in this ruling, these policies ae not inconsistent with the housing element.

Policy TC-Xa7 is not inconsistent with the general plan's housing element. The petition is denied as to policy TC-Xa7.

Validity of Measure E Implementation Statements

At the conclusion of Measure E there are nine implementation statements. Petitioner challenges the fourth and eighth statements. Petitioner contends that the fourth statement is invalid as inconsistent with the seventh implementation statement related to the requirement that the multi-family TIM fee be paid for secondary dwellings; and the eighth statement is invalid, because it is premised upon adoption of CALTRANS LOS determinations that are premised upon unfounded assumptions that Highway 50 is or will soon be operating at an LOS F, the statement frustrates the efficient administration of the County's CIP/TIM fee program, and that statement is inconsistent with policy TC-Xd in that it delegates to CALTRANS authority to determine LOS conditions when that responsibility is assigned to the County Department of Transportation.

Respondents/Intervenors Taylor and Save Our County contend in opposition that implementation statement four has been found by County staff to be consistent with TIM Fee resolution 021-2012; implementation statement eight is designed to collect data in real time, because CALTRANS can collect such data and the County can not; and the County currently uses CALTRANS data.

- Initiative Interpretation

""Although the initiative power must be construed liberally to promote the democratic process [citation] when utilized to enact statutes, those statutes are subject to the same constitutional limitations and rules of construction as are other statutes." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675, 194 Cal.Rptr. 781, 669 P.2d 17.) The same is true when a local initiative is at issue." (Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531, 540.)

"We agree with the Court of Appeal that the court must, wherever possible, construe an initiative measure to ensure its validity. Basic to all statutory construction, however, is ascertaining and implementing the intent of the adopting body. (Code Civ.Proc., § 1859; *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764, 274 Cal.Rptr. 787, 799 P.2d 1220; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645, 335 P.2d 672.) Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure (*Burger v. Employees' Retirement System* (1951) 101 Cal.App.2d 700, 226 P.2d 38) and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. (*People v. One 1950 Ford V–8 Coupe* (1951) 36 Cal.2d 471, 224 P.2d 677.)" (Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531, 543.)

The Third District Court of Appeal has held: "A voter initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8.) The electorate acts as a legislative entity when it acts through its initiative power. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1044–1045, 56 Cal.Rptr.3d 814, 155 P.3d 226 (*Professional Engineers*).) ¶ In interpreting a voter initiative, including one amending the state Constitution, we apply the same principles governing statutory construction. "We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48

Cal.4th 564, 571, 107 Cal.Rptr.3d 265, 227 P.3d 858, citing *Professional Engineers, supra,* 40 Cal.4th 1016, 56 Cal.Rptr.3d 814, 155 P.3d 226 [voter initiative, expressly removing constitutional restriction on government's ability to contract with private firms for architectural and engineering services on public works projects, impliedly repealed preexisting statutes regulating private contracts for architectural and engineering services].) Our job is to ascertain and declare what is in terms or in substance contained in the provision, not to insert what has been omitted or omit what has been inserted. (Code Civ. Proc., § 1858.) We adopt a construction "that will effectuate the voters' intent, giv[ing] meaning to each word and phrase, and avoid absurd results. [Citations.]" (*People v. Stringham* (1988) 206 Cal.App.3d 184, 196–197, 253 Cal.Rptr. 484 (*Stringham*) [construing 1982 Victims' Bill of Rights].) ¶ "But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose...." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) The meaning "may not be determined from a single word or sentence; the words must be construed in context.... Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]" (*Ibid.*)" (Santos v. Brown (2015) 238 Cal.App.4th 398, 409–410.)

With the above-cited principles in mind, the court will determine if the two challenged implementation statements are valid.

Measure E implementation statement four provides: "No Traffic mitigation fee shall be required for remodeling of existing residential units including adding a second kitchen, shower, or bath in the house or garage that were built pursuant to a valid building permit from the County of El Dorado."

Measure E implementation statement seven provides: "Second dwelling as defined under County Code Chapter 17.15.030 shall be subject to the multi-family fee."

The intent of implementation statement four is clear – a TIM fee payment is not required for permitting the addition of a second kitchen, shower, or bath in an existing house or existing garage that were built pursuant to a valid building permit. To the extent that implementation statements four and seven conflict related to the imposition of multi-family TIM fee, the court must harmonize the two statements in order to carry out the overriding intent of Measure E. If the statements can not be harmonized, then the specific statement takes precedence over the general statement.

'"[A] statute should be construed with reference to the entire statutory system of which it forms a part in such a way that harmony may be achieved among the parts ...."' (*People ex rel. Younger v. Superior Court*, 16 Cal.3d 30, 40, 127 Cal.Rptr. 122, 544 P.2d 1322.) 'Wherever possible, potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act.' (*Wells v. Marina City Properties, Inc.*, 29 Cal.3d 781, 788, 176 Cal.Rptr. 104, 632 P.2d 217.) 'A construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless.' (Ibid.) Finally, statutes must be construed in a reasonable and common sense manner consistent with their apparent purpose and the legislative intent underlying them--one practical, rather than technical, and one promoting a wise policy rather than mischief or absurdity. (*City of Costa Mesa v. McKenzie*, 30 Cal.App.3d 763, 770, 106 Cal.Rptr. 569; *Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 105, 102 Cal.Rptr. 692.)" (Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal.App.3d 334, 338.)

"If two seemingly inconsistent statutes conflict, the court's role is to harmonize the law. (*People v. Pieters* (1991) 52 Cal.3d 894, 899, 276 Cal.Rptr. 918, 802 P.2d 420 ["[w]e do not

construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness' [Citation]"]; *Chatsky & Associates v. Superior Court* (2004) 117 Cal.App.4th 873, 876, 12 Cal.Rptr.3d 154 ["Where, as here, we are called upon to interpret two seemingly inconsistent statutes to determine which applies under a particular set of facts, our goal is to harmonize the law [citation] and avoid an interpretation that requires one statute to be ignored. [Citation]"].) We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 289, 42 Cal.Rptr.2d 241.) If inconsistent statutes cannot otherwise be reconciled, "a particular or specific provision will take precedence over a conflicting general provision." (*Ibid.;* see also § 1859.)" (Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal.App.4th 1040, 1055–1056.)

The court is unable to find any County Code Chapter 17.15.030. There is no Chapter 17 in the El Dorado County Ordinance Code. However, Title 130 of the El Dorado County Ordinance Code related to zoning provides in Section 130.80.020 a definition for secondary dwellings, which states: "**Secondary Dwelling.** (Use Type) A residential unit, either attached or detached, with independent living, sleeping, dining, kitchen, and sanitation facilities that is accessory to the primary dwelling on a lot zoned for single-unit residential development. (See Section 130.40.300: Secondary Dwellings.)" (Emphasis in original.)

Instead of relying on the definition "second dwelling" in the County Ordinance Code, petitioner cites the 2013 California Building Code definition of "dwelling unit" in support of the argument that a "dwelling unit" includes a converted garage with a second kitchen and bathroom or shower. Petitioner states that the 2013 Building Code provides that a "dwelling unit" is: "a single unit providing complete, independent living facilities for one or more persons,

including permanent provisions for living, sleeping, eating, cooking and sanitation." (See Petitioner's Opening Brief, page 23, lines 15-18.)

First, implementation statement seven specifically refers to the County Ordinance Code definition of "second dwelling" not the Building Code definition of "dwelling unit".

Second, even assuming for the sake of argument that the "dwelling unit" and "secondary dwelling" definitions apply to the determination of "second dwelling" in implementation statement seven, the two statements can easily be reconciled and harmonized to give effect to both statements. To the extent that the remodel of an existing residential unit by adding a second kitchen and/or shower or bath to the residential unit and/or existing garage does not require payment of a TIM fee under implementation statement four, it amounts to an express exception to the term of "second dwelling" as used in implementation statement seven and can not be considered a "second dwelling" for the purposes of implementation statement seven. That would leave implementation statement seven applicable to new construction of residential units that include a second dwelling. This construction effectuates the clear intent of implementation provisions of the initiative enacted by the voters of El Dorado County that no traffic mitigation fee be required for remodels of existing residential units that add a second kitchen, shower, or bath in the house or garage. Therefore, implementation statement four is valid and the petition is denied as to implementation statement four.

Measure E implementation statement eight provides: "LOS traffic levels on Highway 50 on-off ramps and road segments shall be determined by CalTrans and fully accepted by the County for traffic planning purposes."

Policy TC-Xh provides in pertinent part: "…Level of Service will be as defined in the latest edition for the Highway Capacity Manual (Transportation Research Board, National Research Council) and calculated using the methodologies contained in that manual. Analysis periods

shall be based on the professional judgment of the Department of Transportation which shall consider periods including, but not limited to, Weekday Average Daily Traffic (ADT), AM Peak Hour, and PM Peak hour traffic volumes."

Measure E implementation statement eight directly conflicts with and contradicts a policy of the Traffic and Circulation Element of the general plan. Implementation statement eight leaves the determination of LOS traffic levels in solely in the hands of CALTRANS, which would presumably include selection of analysis periods, even though policy TC-Xh mandates that analysis periods shall be based upon the professional judgment of the County Department of Transportation. There is an internal inconsistency in the general plan where one part of an element contradicts another part of the same element. (South Orange County Wastewater Authority v. City of Dana Point (2011) 196 Cal.App.4th 1604, 1619.) Even initiative amendments to the general plan must adhere to the requirement that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the County. The petition is granted as to Measure E implementation statement eight.

The court notes that implementation statement nine provides "If any provision of this measure is for any reason held to be invalid, the remaining provisions shall remain in full force and effect."

The petition is granted in part and denied in part as described in the text of the ruling.

TENTATIVE RULING # 1: THE PETITION IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING.